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No. 94-____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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CHESAPEAKE BAY FOUNDATION, INC.,
*Petitioner,*

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
*Respondent.*

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In deciding whether to award attorney's fees in a Freedom of Information Act case that has been resolved without a ruling on the merits, is the district court obligated to decide the merits and to preclude any fee award if it finds in the government's favor?

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## PETITION FOR A WRIT OF CERTIORARI

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 11 F.3d 211 (1993), and is reproduced in the appendix at 1a-11a. The decision of the United States District Court for the District of Columbia is reported at 785 F. Supp. 1030 (1992), and is reproduced in the appendix at 12a-17a. References to the Joint Appendix in the court of appeals are designated "JA."

## JURISDICTION

The judgment of the court of appeals was entered on December 28, 1993. On February 10, 1994, petitioner filed a timely petition for rehearing and suggestion for rehearing en banc, both of which were denied on March 11, 1994 (18a). On May 26, 1994, Chief Justice Rehnquist granted an

extension of time in which to file this petition to and including July 9, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The attorney's fee provision of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(E), states as follows:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

## STATEMENT OF THE CASE

Petitioner Chesapeake Bay Foundation, Inc. is a non-profit corporation whose principal goal is to protect the environmental quality of the Chesapeake Bay watershed. In furtherance of this goal, petitioner sought data on pesticide use by Maryland public agencies. Affidavit of Patrick H. Gardner (April 8, 1991). JA 95-97. Respondent United States Department of Agriculture had collected such data through surveys and published a statistical compilation based on that data. JA 95-96. Accordingly, petitioner filed a request under FOIA with respondent seeking the raw data submitted by public agencies in Maryland. JA 96-97. Respondent resisted disclosure based on the confidentiality provision contained in 7 U.S.C. § 2276(a)(2), which prevents respondent from revealing the identity of the "person" who had supplied the survey information. JA 97. While respondent claimed that section 2276 applied to both public and private entities who answered the survey, petitioner argued that section 2276 protected only the identities of private pesticide applicators, not public agencies. JA 96-97.

Although respondent had offered during the administrative process to seek waivers of confidentiality from the Maryland agencies at petitioner's expense, several Maryland agencies told petitioner that they would not sign waivers, which led petitioner to believe that the waiver procedure would result in an incomplete data set that would be of limited use. JA 96-99; Supplemental Affidavit of Bradley M. Campbell (Feb. 26, 1992) (JA 102-04). After petitioner filed its FOIA suit under 5 U.S.C. § 552(a)(4)(B), the district court directed respondent to notify the Maryland agencies that they could raise any objections to release of the pesticide data. JA 66-68. The Maryland Attorney General took an active role in persuading otherwise recalcitrant agencies to agree to disclosure of their data. JA 104. After obtaining 102 waivers, respondent released the Maryland agencies' survey forms to petitioner. Upon further prodding, and a court order to show cause, JA 94, the last state agency released its survey form to petitioner. Thus, the litigation was resolved favorably to petitioner, without the need for the district court to rule on the legal question in the case -- whether 7 U.S.C. § 2276 exempted the records from disclosure absent a waiver.

Thereafter, petitioner applied for attorney's fees and costs under FOIA, 5 U.S.C. § 552(a)(4)(E). The district court first concluded that petitioner's lawsuit "was necessary and was responsible for its obtaining the information requested" because respondent had strenuously opposed petitioner's access to the data (16a). The court then determined that petitioner was entitled to attorney's fees and costs "upon the Court's balancing of the following four factors: (1) the benefit of the release to the public; (2) the commercial benefit of the release to the plaintiff; (3) the

nature of the plaintiff's interest; and (4) the reasonableness of the agency's withholding" (16a).[1]

The district court did not make an express finding as to whether respondent's withholding was reasonable, but the court concluded that all of the other factors made an award of attorney's fees appropriate:

> Chesapeake was acting as a public watchdog in obtaining this information. The entire public benefits when it has information regarding the use or nonuse of potentially harmful chemicals. In addition, the Plaintiff had no commercial interest in obtaining the information. Rather, it was only attempting to ascertain whether or not the information collected by the USDA indicated that the public as a whole was being subjected to unsafe or unhealthy chemical use. That interest is entirely appropriate for an award of attorneys' fees and costs (16a-17a).

On appeal, the District of Columbia Circuit agreed with the district court that petitioner was eligible for attorney's fees because petitioner reasonably believed that the survey data would not be released absent a lawsuit, and the lawsuit caused release of the data "by deploying the power of the court to encourage reluctant agencies to waive their confidentiality interests" (8a). However, the court of appeals concluded that the case must be remanded because the district court had failed to consider whether respondent's withholding had a reasonable basis (9a).

This decision alone would not have been a basis for review by this Court. But, in a ruling applicable to all FOIA disputes in the D.C. Circuit, the court of appeals went much further and imposed an unprecedented constraint on the

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[1] As explained *infra* at 7-8, these four factors are taken from a version of the FOIA fee provision which was not adopted by Congress, but they are contained in the legislative history.

availability of attorney's fees by requiring the district court to decide the merits of the underlying litigation. Thus, the court of appeals stated:

> [T]here can be no doubt that a party is not entitled to fees if the Government's legal basis for withholding requested records is correct (9a).
>
> [If] the Government continues to insist that it had a valid basis for withholding requested documents, the District Court must determine whether the Government's position is legally correct in assessing any claim for fees under FOIA (9a-10a).
>
> If the Government was right in claiming that the data were exempt from disclosure under FOIA, then no fees are recoverable (10a).

Finally, the court of appeals mandated that on remand:

> [T]he District Court must either disallow fees, premised on the reasonableness of the position weighed along with the other considerations relevant to the entitlement calculus; or the court must decide whether the Government's position is legally correct -- for, if so, this will be dispositive of the case. If the District Court reaches the merits of the Government's position, and holds it is incorrect, then the court still must weigh the concededly reasonable legal position along with the other factors to determine whether CBF is entitled to fees (10a-11a).

Although the court of appeals stated that "it is appropriate for the District Court to entertain these questions in the first instance on remand," it offered its opinion,

without further analysis, that respondent's reading of 7 U.S.C. § 2276 is "likely correct" (11a).[2]

## REASONS FOR GRANTING THE WRIT

The decision below has created an irreconcilable conflict in the circuits by its insistence on the primacy of one factor in FOIA fee disputes, whereas the other circuits require that, at a minimum, all four factors mentioned in FOIA's legislative history be considered in assessing a FOIA fee application. Indeed, other circuits specifically reject the notion that the fourth factor -- the reasonableness of the government's decision to withhold the documents -- can alone be used to deny fees to a prevailing FOIA plaintiff. In addition to this division among the circuits, the ruling below, which requires a settling plaintiff to prove that it would have succeeded had the case been litigated to judgment, is contrary to authority from this Court and the lower federal courts. Further, the ruling below, if allowed to stand, will do great damage to longstanding policies favoring settlement because it will increase the cost and complexity of FOIA litigation. For these reasons, as explained in more detail below, review should be granted.

### A. The Decision Below is in Conflict With Decisions of Other Federal Circuits Under FOIA's Fee Provision.

The court of appeals' decision requires district courts to decide the merits of resolved FOIA claims before awarding attorney's fees. However, FOIA's fee provision,

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[2] Neither the panel nor the district court addressed petitioner's argument that, where, as in 7 U.S.C. § 2276, the term "person" is not defined, it is ordinarily construed to exclude the sovereign. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979).

enacted in 1974, P.L. No. 93-502, 88 Stat. 1561 (1974), states only that:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

5 U.S.C. § 552(a)(4)(E). Despite this broad discretionary language, the decision below eliminates the district court's discretion to award fees if it determines that the government's position was legally correct.

This simple statutory language was contained in the original FOIA bill in the House of Representatives that contained a fee provision. It gave courts the discretion to award attorney's fees to prevailing parties, without requiring consideration of any particular factors in the exercise of that discretion. H.R. 12471, 93d Cong., 2d Sess. (1974), in Joint Committee Print, 94th Cong., 1st Sess., *Freedom of Information Act and Amendments of 1974, Source Book: Legislative History, Texts, and Other Documents*, at 133 (1975) ("Source Book"). According to the House report, the language was drawn from similar attorney's fees provisions, which had been construed to require an award of fees to a prevailing party, "unless special circumstances would render such an award unjust." *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973) (per curiam); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam); *see* H. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), in Source Book at 126-27; *see also West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88-89 (1991) (similarly worded fee-shifting statutes should be construed the same).

The Senate bill also contained a fee-shifting provision, but required that the district court consider four specific criteria in exercising its discretion: (1) the benefit of the release to the public; (2) the commercial benefit of the

release to the plaintiff; (3) the nature of the plaintiff's interest; and (4) whether the government's withholding had a reasonable basis in law. S. 2543, 93d Cong., 2d Sess. (1974), in Source Book at 189-90; S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974), in Source Book at 171.

The conference committee eliminated the mandatory consideration of the four criteria, adopted the House bill, and explained as follows:

> By eliminating th[e Senate bill] criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Instead, the conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary.

H. Rep. No. 93-1380, 93d Cong., 2d Sess. (1974), in Source Book at 227. Thus, the Conference Committee did not foreclose use of the Senate's criteria, which the Senate Report had declared were "intended to provide guidance and direction -- not airtight standards ... ." Source Book at 171. In light of this history, although the FOIA itself does not direct the courts to consider any specific factors, the courts have looked to the Conference and Senate Reports for guidance in deciding whether to award attorneys' fees and costs.

As a result, the courts have repeatedly recognized that, by using the word "may," the FOIA fee provision leaves the award of attorney's fees to the sound discretion of the district court. *See, e.g., Church of Scientology of California v. Harris*, 653 F.2d 584, 590 (D.C. Cir. 1981); *Blue v. Bureau of Prisons*, 570 F.2d 529, 533 (5th Cir. 1978). However, under the decision below, the fourth factor ("reasonable basis in law") is dispositive in a case resolved prior to a ruling on the merits, if the court finds that the position of the

government was "correct" (9a, 10a). Thus, the court ruled that "no fees are recoverable" "[if] the Government was right in claiming that the [withheld] data were exempt from disclosure under FOIA... " (10a). Only if petitioner successfully wards off the government's claim that its position was right all along, may it then argue that it is entitled to fees under the four-factor test, including the reasonableness prong (10a-11a).

This approach is at odds with that taken in the other circuit courts, which have required that, at the very least, the four factors from the Senate bill be considered, and that no one factor may be dispositive. For instance, in *Crooker v. United States Parole Comm'n*, 776 F.2d 366, 369 (1st Cir. 1985), the court concluded that "the government's original withholding of [the relevant records was not] unreasonable... ." It nevertheless emphasized that it did "not believe that this factor ... should deprive appellant of attorney's fees. *One factor alone is not dispositive*... [.] Congress made clear [in the legislative history] that such criteria are not to be used as 'airtight' standards." *Id.* (emphasis added). This is a far cry from the ruling here, under which the fourth factor is dispositive if the government can show -- after the litigation on the merits is over -- that it would have won the case.[3]

Similarly, in *Local 598 v. Dep't. of the Army Corps of Engineers*, 841 F.2d 1459 (9th Cir. 1988), the district court had denied fees under FOIA entirely on the basis of the purported reasonableness of the government's legal position. The Ninth Circuit disagreed on the reasonableness question, and also held that the lower court had erred by "fail[ing] to consider the other factors it was *required* to balance." *Id.* at 1464 (emphasis added). Because "the district court relied

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[3] *See also Education/Instruccion Inc. v. HUD*, 649 F.2d 4, 7-8 (1st Cir. 1981).

entirely on the fourth factor," *id.* at 1462, it had abused its discretion. *Id.* at 1464.[4]

The same approach was taken in the leading case of *Blue v. Bureau of Prisons, supra,* 570 F.2d at 534. There, the Fifth Circuit held that it was an "abuse of discretion" for the district court not to have considered all four factors, even when one of them -- the benefit to the public -- appeared to outweigh the other three.[5]

The ruling below thus stands in stark contrast to the law of the other circuits, which, consistent with the statutory language that the court "may assess reasonable attorney's fees," 5 U.S.C. § 552(a)(4)(E), requires that a variety of factors be considered by the district court in ruling on a FOIA fee application. The court below held that one factor alone may be dispositive even though that factor appears only

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[4] *See also Long v. IRS*, 932 F.2d 1309, 1313 (9th Cir. 1991); *Church of Scientology v. United States Postal Service*, 700 F.2d 486, 492 (9th Cir. 1983).

[5] *See also Lovell v. Alderete*, 630 F.2d 428, 431, 433 (5th Cir. 1980). The Second and Seventh Circuits have also ruled that the district court must at least review the four criteria mentioned in the legislative history. *See Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509 (2d Cir. 1976); *Stein v. Department of Justice*, 662 F.2d 1245, 1262 (7th Cir. 1981)(court should consider four factors "at a minimum"). The D.C. Circuit itself had previously adhered to this view as well, in a case that had settled prior to a ruling on the merits. *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365 (D.C. Cir. 1977)(all four factors "are to be considered"). In *Nationwide Building Maintenance, Inc. v. Sampson*, 559 F.2d 704, 714 (D.C. Cir. 1977)(courts "must be careful not to give any particular factor dispositive weight"), the court stated the same view, but dicta in a footnote in that opinion is arguably consistent with the ruling below and appears to have formed the court of appeals' otherwise unprecedented ruling here. *Id.* at 712 n.34; (10a).

in a version of the law that passed only one chamber of Congress and then was abandoned in conference. This Court should grant review to reconcile these very different approaches.

### B. The Ruling Of The Court of Appeals Is At Odds With Precedent Under Other Fee-Shifting Statutes, And Will Unnecessarily Increase Litigation Under FOIA.

In holding that the parties must fully litigate an already-resolved FOIA case, and that the plaintiff must, in essence, also "win" that case to obtain an award of fees, the court of appeals' ruling will, unless corrected, unnecessarily increase litigation under FOIA. Review should also be granted because the D.C. Circuit's approach is at odds with the decisions of this Court and the lower federal courts under other fee-shifting statutes and will undermine national policy favoring settlements.

**1.** Under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, and most other federal fee-shifting statutes, the courts generally employ the two-step approach first established in *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978), to determine whether a plaintiff who has gained some of the relief sought, without obtaining a ruling on the merits, should be awarded attorney's fees. First, the plaintiff must show that the suit was a causal factor in obtaining the relief. *Id.; see Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987). That is the law under FOIA as well, *see, e.g., Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976), as the court of appeals below noted (8a). Here, both the court of appeals (8a) and the district court (15a-16a) held that petitioner substantially prevailed for fees purposes because its suit caused the release of the pesticide data held by respondent.

Second, the plaintiff must show that the legal premise of the suit was not frivolous, unreasonable, or groundless, *Nadeau*, 581 F.2d at 281 (citing *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978)), but no further showing of the ultimate merit of the suit is required. *Id.* This test "requires courts to dismiss fee claims based wholly on frivolous lawsuits, but simultaneously constrains them from holding a full trial, or from making *ad hoc* predictions about [a] plaintiff's chances for success, on the merits." *Miller v. Staats*, 706 F.2d 336, 341 n.31 (D.C. Cir. 1983). The *Nadeau* standard has been followed in almost every circuit in cases interpreting a variety of similarly worded federal fee-shifting statutes under which reasonable attorney's fees "may" be awarded. *See, e.g.*, 42 U.S.C. § 1988 ("the court, in its discretion, may allow ... a reasonable attorney's fee ..."). Under that standard, courts have established a minimal threshold for testing the substantiality of a federal claim, and expressly have rejected a searching review of the merits to determine whether the plaintiff would have won if the case had not been settled.[6]

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[6] *See, e.g., Collins v. Romer*, 962 F.2d 1508, 1514 (10th Cir. 1992)(not "frivolous or groundless"); *Associated Builders & Contractors of Louisiana v. Orleans Parish School* Bd., 919 F.2d 374, 378 (5th Cir. 1990)(lacks "colorable merit"); *Koster v. Perales*, 903 F.2d 131, 136 (2d Cir. 1990)(not "frivolous, unreasonable, or groundless"); *Sablan v. Department of Finance of N. Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988)(same); *Miller v. Staats*, 706 F.2d 336, 341 & n.31 (D.C. Cir. 1983)("not wholly frivolous"); *Johnston v. Jago*, 691 F.2d 283, 287 (6th Cir. 1982)(not "patently frivolous"); *Harrington v. DeVito*, 656 F.2d 264, 266 (7th Cir. 1981)(not "frivolous, unreasonable, or groundless"); *Staten v. Housing Authority of City of Pittsburgh*, 638 F.2d 599, 605 (3d Cir. 1980)("not frivolous"); *United Handicapped Federation v. Andre*, 622 F.2d 342, 347 (8th Cir. 1980)(not "frivolous, unreasonable, or groundless"); *see also Ford v. Selective Service System*, 439 F. Supp. 1262, 1265 (M.D.

This Court's approach in *Maher v. Gagne*, 448 U.S. 122 (1980), follows the same path. There, the Court affirmed an award of fees under 42 U.S.C. § 1988 to plaintiffs who had obtained a consent decree, despite defendants' argument that fees could not be awarded where no formal judicial relief on the merits had been entered. The complaint in *Maher* had alleged federal claims on which the lower courts had not passed, but this Court simply observed that they were "sufficiently substantial to support federal jurisdiction under *Hagans v. Lavine*, [415 U.S. 528 (1974)]." *Id.* at 131. The Court deemed important the fact that the federal claims, as did the FOIA claim here, "remained in the case until the entire dispute was settled ...." *Id.* As Justice Powell declared, concurring in the judgment, because the federal claims were "substantial" under *Hagans*, the Court had "no occasion to look behind the settlement agreement to evaluate further the constitutional cause of action." *Id.* at 134.

We acknowledge that the legislative history of FOIA suggests that the courts may consider the reasonableness of the government's position on the merits when ruling on a prevailing plaintiff's eligibility for attorney's fees. However, the fundamental problem with the decision below is that, contrary to what federal courts have done in construing fee-shifting statutes worded similarly to 5 U.S.C. § 552(a)(4)(E), *it mandates a definitive ruling on the merits in settled cases.* Review is thus warranted because the court of appeals' novel standard for awarding fees in settled FOIA cases is wholly different from the approach taken generally by this Court and the lower federal courts under comparable fee-shifting statutes.

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Pa. 1977)(to require plaintiff's FOIA fee request to "be determined on the merits on an application for attorney's fees ... could not possibly be desired by Congress when a case has been settled").

**2.** But it is not simply this split in authority, taken in the abstract, that should command this Court's attention. It is for good reason that the federal courts have purposefully avoided deciding the legal validity of cases resolved without a ruling on the merits, once it can be shown that the plaintiff's position was not frivolous.

Judicial economy is seriously impaired by the ruling below. Henceforth, FOIA plaintiffs in the D.C. Circuit -- where a significant proportion of FOIA litigation takes place -- will be required to prove the merits of their settled cases in order to obtain fees. Knowing that a merits determination must occur, absent settlement of *both* the merits and fees, resolution of the underlying merits without a judicial ruling will be much less likely than was previously the case. Put simply, whenever an additional point of contention is present in litigation, as the court of appeals' ruling has mandated here, that case becomes more difficult to resolve.

The approach of the D.C. Circuit also runs headlong into the national policy favoring settlement of litigation. *See Marek v. Chesny*, 473 U.S. 1, 5, 10-11 (1985); Fed. R. Civ. P. 68; Fed. R. Civ. P. 16(a)(5), (c)(7). One of the reasons that litigants resolve disputes is to avoid the setting of precedent where neither party is confident about the outcome. That concern is particularly evident in FOIA litigation, and in other litigation involving the government, where a decision on the merits will likely have far-reaching consequences for the parties and the public beyond the particular suit in question. Obviously, avoidance of the resolution of controversial issues by the courts is made much more difficult if the merits are thrust upon the parties at the fee stage, as is true under the court of appeals' ruling here.

Nor is the resolution of the merits in FOIA cases a simple matter. Generally, it is necessary for plaintiffs to conduct discovery and submit comprehensive documentary evidence and affidavits to determine, for instance, whether the requested records are exempt as confidential commercial

information, 5 U.S.C. § 552(b)(4), or on the basis of some other privilege. *Id.* § 552(b)(5). In many cases, voluminous indices must be prepared by the government and reviewed by the plaintiff and the court in order to evaluate the validity of the government's exemption claims. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

As in other litigation, resolution of FOIA cases short of a ruling on the merits allows the parties to avoid the costs, as well as the uncertainties, associated with complex litigation. But under the ruling below, these costs and uncertainties will simply be shifted to the fee dispute, where the very issues "avoided" in the "settlement" will have to be decided. Either the parties will engage in wasteful discovery and other tactics at the merits stage in preparation for an eventual fee dispute, even when they otherwise would want an early settlement, or they will need to recreate the merits at the fee stage. In short, the question whether the government's decision to withhold documents was legally "correct" (9a) will often be difficult and time-consuming, and will involve considerable additional investment of resources by the parties and the judiciary.

Moreover, if the government loses on the fees issue, it may feel compelled to take an appeal, even if the fees awarded are small, because it cannot allow the adverse precedent to stand even at the district court level. *See Pierce v. Underwood*, 487 U.S. 552, 561 (1988). And, since fees are allowed for litigating and prevailing on the issue of fees, *see Comm'r, INS v. Jean*, 496 U.S. 154, 161-62 (1990), and fee disputes that are really merits disputes will be much more expensive, the costs to everyone will be increased greatly.

This provides strong practical support for courts' insistence that, in settled disputes where fees remain at issue, the plaintiff's claims be scrutinized at a highly generalized level, solely to determine whether the claims were reasonable or not frivolous. *See generally Pierce*, 487 U.S. at 560-61;

*see supra* note 6. Precisely because the courts should have had "no occasion to look behind" the settlement of a case, *Maher*, 448 U.S. at 134 (Powell, J., concurring in the judgment), they are "constrain[ed]...from holding a full trial..." on the merits. *Miller*, 706 F.2d at 341 n.31. However, the effect of the court of appeals' ruling is to "totally obviate the time and financial benefits that flow from a resolution of a lawsuit prior to a full blown hearing on the merits." *Garcia v. Guerra*, 744 F.2d 1159, 1162 (5th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985); *see also Long v. Bonnes*, 455 U.S. 961, 966 n.3 (1982) (Rehnquist, J., joined by O'Connor, J., dissenting from denial of certiorari)(test for determining right to fees "does not require a finding that the plaintiff would have prevailed on the merits, nor does it require the trial court to hold the very trial which the settlement was intended to avoid"). In sum, by requiring petitioner to litigate a case it has already resolved, the court of appeals has violated this Court's oft-repeated admonition that a "request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see also Pierce*, 487 U.S. at 561.[7]

**3.** There is an anomalous aspect of the decision below that further suggests it is in error and warrants this Court's attention. Under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) -- an attorney's fee statute under which prevailing parties may obtain fees against the federal government in a wide range of circumstances -- the statutory language itself provides that fees will be denied if the government can show that its position on the merits was "substantially justified." *Id.* § 2412(d)(1)(A). But even with

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[7] As the district court observed here (16a), "such a rule would place a premium on possibly needless litigation while penalizing deserving litigants by denying them their attorneys' fees should they accept a settlement providing them with substantially all the relief they sought."

that statutory direction to examine the merits, this Court has cautioned courts, especially appeals courts, against deciding the merits during a fee dispute in a way that "effectively establish[es] circuit law in a most peculiar, second-handed fashion." *Pierce*, 487 U.S. at 561 (for this reason, among others, appellate review of substantial justification decisions may not be made *de novo*); *see also Garcia v. Guerra*, 744 F.2d at 1166 (Randall, J., concurring) (if prevailing party's position is not frivolous, court should "intimate no opinion on the merits"). Yet under the D.C. Circuit's interpretation of the FOIA, even though the statute does not mention or allow a defense based on substantial justification, *see* 5 U.S.C. § 552(a)(4)(E), the government can avoid all fees if it later proves that it was correct on the merits. Given the care exercised by Congress in allowing the merits to be brought in at the fee stage under EAJA, it would be odd indeed if Congress had intended to provide a much more substantial role in the resolution of fee disputes under FOIA, without a word to that effect.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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We gratefully acknowledge the assistance of John A. Freedman, a student at Harvard Law School, and Fred Bernstein, a recent graduate of New York University Law School.

July 8, 1994

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued October 18, 1993 Decided December 28, 1993

No. 92-5174

CHESAPEAKE BAY FOUNDATION, INC.,
APPELLEE

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
APPELLANT

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On Appeal from the United States District Court
for the District of Columbia
(No. 89cv01943)

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*Charles F. Flynn*, Assistant United States Attorney, argued the cause for appellant. With him on the briefs were *J. Ramsey Johnson*, United States Attorney, *John D. Bates* and *R. Craig Lawrence*, Assistant United States Attorneys.

*Gregory L. Poe* argued the cause for appellee. With him on the brief were *Mitchell Rogovin* and *Randal S. Milch*.

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD, EDWARDS, and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge:* The Chesapeake Bay Foundation, Inc. ("CBF"), is a not-for-profit corporation whose principal goal is to pursue projects designed to restore and maintain the biological integrity of the Chesapeake Bay and its living resources. In 1988, in furtherance of its conservation mission, CBF sought data on public pesticide use in the state of Maryland. Upon determining that data concerning pesticide use by Maryland state agencies were unavailable to the public, CBF turned to the United States Department of Agriculture ("USDA") for the information. It appears that USDA possessed raw data on Maryland pesticide use obtained through informational surveys submitted to the Federal Government by Maryland state agencies.

Initially, CBF made an informal request for release of the survey data. Officials at USDA responded that they could not release the data because the agency was prohibited by statute from publicly disclosing records that would identify the "person" who had supplied the information. *See* 7 U.S.C. § 2276(a) (1988). However, USDA officials offered to seek waivers from the state agencies that had provided the survey data if CBF would pay the postage to mail the waiver requests. CBF then filed a formal request for the data under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(E) (1988). This FOIA request was denied by USDA on the grounds that the information sought could not be released without waivers, which USDA again offered to seek if CBF would pay the postage.

CBF refused USDA's offers to seek waivers and instead filed a lawsuit to compel the federal agency to release the pesticide data. Without deciding whether CBF was legally entitled to the information, the District Judge urged the parties to seek state agency waivers so as to avoid a trial on the merits. *See* Trial Transcript, *reprinted in* Joint Appendix ("J.A.") 37–39. The trial judge then issued an order to the Maryland agencies, requiring state officials to appear in court to raise any objections they might have to USDA's release of

the pesticide data. Although the trial judge never explained the basis for his "orders" to state agencies that were not parties to the lawsuit, the solution adopted by the court essentially mirrored USDA's pre-litigation suggestion that waivers be sought. Thus, USDA was required to do nothing more than what it had proposed to do before the lawsuit was filed; and, eventually, all the Maryland agencies waived their confidentiality interests and CBF received the documents. The case was dismissed and the District Court awarded $44,373.07 in attorneys' fees to CBF for having "substantially prevailed" in obtaining release of the requested documents. *See Chesapeake Bay Found., Inc. v. United States Dep't of Agriculture*, 785 F. Supp. 1030, 1033 (D.D.C. 1992).

USDA appeals from the District Court's judgment awarding fees. USDA argues that CBF is not entitled to fees because USDA had a reasonable basis in law for withholding the records CBF sought, and because USDA cooperated in devising a means whereby CBF got what it wanted without compromising USDA's view that section 2276(a) of title 7 prohibited nonconsensual release of these records. We agree with USDA that it had a reasonable basis in law for withholding these records. Because the District Court failed properly to weigh this consideration before deciding whether CBF was entitled to attorneys' fees, we reverse and remand for further consideration.

## I. Background

CBF brought this lawsuit under FOIA to obtain data held by USDA. According to CBF, data concerning pesticide use by Maryland state agencies were unavailable to the public in 1988. *See* Affidavit of Patrick H. Gardner, *reprinted in* J.A. 95. USDA, however, possessed raw data that these agencies had voluntarily provided to the Federal Government concerning their pesticide use. Consequently, CBF sought this information directly from USDA.

The disputed data was collected by USDA through survey forms mailed to Maryland pesticide users, including Maryland public agencies. Trial Transcript, J.A. 17. USDA collected

this data under a promise of confidentiality rooted in 7 U.S.C. § 2276(a). That section dictates that information that has been provided in a survey may not be:

> (1) use[d] . . . for a purpose other than the development or reporting of aggregate data in a manner such that the identity of the person who supplied such information is not discernable and is not material to the intended uses of such information; or
>
> (2) disclose[d] . . . to the public, unless such information has been transformed into a statistical or aggregate form that does not allow the identification of the person who supplied particular information.

7 U.S.C. § 2276(a) (1988). USDA has consistently maintained that section 2276(a) shields information provided by *both* public and private survey respondents, and that 5 U.S.C. § 552(b)(3) ("Exemption 3"), which provides that agency records are properly withheld if they are specifically exempted from disclosure by statute, thus prevents release of such records under FOIA.

Initially, in June 1988, CBF informally requested that USDA release the public agency survey data, but USDA declined to oblige. In July 1988, CBF made a formal FOIA request for "[a]ll unpublished data provided by 129 Maryland public agencies to the National Agricultural Statistics Service ['NASS'] for the compilation of 'Maryland Pesticides Statistics for 1985.'" Letter of Patrick Gardner (Jul. 22, 1988), *reprinted in* J.A. 9. That request was denied by the Economics Agencies FOIA Officer on August 8, 1988. CBF administratively appealed the denial to NASS on September 21, 1988, and NASS denied that appeal on October 31, 1988, informing CBF that it had the right to judicial review. The June 1988 informal denial and the August 1988 FOIA denial were accompanied by USDA's offer "to obtain individual releases for the survey response forms . . . .[and] to absorb the administrative costs of contacting the 129 public agencies if Chesapeake Bay Foundation pays the postal costs." *See, e.g.*, Letter from Charles E. Caudill to Patrick Gardner (Aug. 8, 1988), *reprinted in* J.A. 11. CBF officials did not respond to

USDA's offers to seek waivers, apparently believing that the "non-FOIA procedure offered by USDA was unfounded." Affidavit of Patrick H. Gardner, J.A. 96, 98. Accordingly, CBF elected to pursue the pesticide data through litigation.

On July 11, 1989, CBF filed a civil action to obtain the survey data. The parties filed cross-motions for summary judgment, addressing the issues raised under 7 U.S.C. § 2276(a). USDA argued that the survey data were obtained pursuant to promises of confidentiality, thus the information sought was protected from disclosure. Trial Transcript, J.A. 24–37. CBF argued that state agencies were not "persons" within the meaning of section 2276(a), so USDA could not withhold disclosure of the survey data under FOIA Exemption 3. *Id.* at J.A. 18–19.

At the status call on the motions, the District Judge questioned whether "anybody [had] asked the state whether they would be willing to cough . . . up" the survey data. *Id.* at J.A. 26. USDA explained that it had offered to seek state waivers, but CBF had declined. The District Judge then postponed consideration of the merits of the case and adopted a procedure similar to that originally proposed by USDA:

> THE COURT: Let me tell you how we'll handle this thing.... I'm going to say the information will be disclosed within 60 days unless [the state agencies] object.
>
> . . .
>
> THE COURT: I'm saying I give you an order that says that this information will be ordered to be turned over under the FOIA and that if you have any objection to that being turned over that you should submit it to the United States District Court within 60 days. Then when we come back in 60 days, we'll look at it. And if it is not there, we turn it over.
>
> With respect to those who don't want it turned over, let's bring them in and find out what the problem is.

Trial Transcript, J.A. 40, 42.

The Government's counsel then expressed her concern that the District Judge appeared to be proposing to release the

survey forms without regard to 7 U.S.C. § 2276(a). In other words, counsel pointed out that the state agencies were under no obligation to justify claims of confidentiality. Government counsel noted further that the state agencies were not parties to the action, and that the District Court was not in a position to adjudicate their rights. *Id.* at J.A. 41, 42. She insisted that unless the agencies waived their interests in the confidentiality of the data, the District Court could not order release of the information without addressing FOIA Exemption 3. The trial judge then appeared to assure counsel that he would not compel involuntary release of the data without an adjudication on the merits:

> MS. CURRENT: It sounds like from what I understood, Your Honor, that you're going to issue an order that orders us to turn this over in 60 days if the state hasn't objected. And I see that as being materially different than what we offered to do.
>
> THE COURT: What's the difference? The state has to come—if they object, then I have to adjudicate to see what their problem is. But why is that much different than what you offered?
>
> MS. CURRENT: If what you're saying, Your Honor, is at the end of the 60 days, you will then adjudicate the propriety of withholding it, I don't think we have an objection to that.

Trial Transcript, J.A. 44.

The District Court entered an order directing the Attorney General of Maryland, and the individual state agencies, to file any objections to the release of the survey information in writing and to appear for a hearing on any objections. March 26, 1990 Order, *reprinted in* J.A. 66–67. The District Court expressly preserved "USDA's right to be further heard on any aspect of [the] matter." *Id.* In compliance with the District Judge's order, USDA wrote the Maryland Attorney General and the interested Maryland agencies, explaining the litigation and enclosing a copy of the order. In the letter, USDA's counsel invited the agencies to execute an enclosed written authorization for release of the information, but as-

sured the state and local officials that USDA would continue to resist disclosure in the event the State or its agencies opposed release of the survey information. *See* Letter of Kenneth E. Cohen (Apr. 18, 1990), *reprinted in* J.A. 81.

Subsequently. the Maryland Attorney General's office filed reports with the District Court concerning the state agency responses. At a status call on September 4, 1990, on the basis of the waivers that had been received, USDA announced its intention to release the survey forms of all but one state agency. The exception was the Department of Parks of Wicomico County, which refused to authorize release of its survey data. *See* Letter of Klaus H. Meyer (Jun. 11, 1990), *reprinted in* J.A. 83. When CBF pressed for the data from Wicomico, the District Judge issued an order on November 26, 1990 requiring the state agency to "show cause why ... [USDA] should not release the 1985 Wicomico County USDA pesticide survey form...." November 26, 1990 Order, *reprinted in* J.A. 94. At a December 12, 1990 status call, the District Court announced that it had received two letters from the Wicomico County authorities, saying that the County would produce the survey form if it received a proper request under the Maryland Freedom of Information Act, or if the District Court should so order. CBF made a written request to Wicomico County and obtained the survey form. In a praecipe filed December 21, 1990, CBF informed the trial court that no issues remained to be resolved with respect to the information sought by CBF in the Complaint.

CBF then requested attorneys' fees and costs as a "prevailing party" under FOIA. *See* 5 U.S.C. § 552(a)(4)(E) (1988). The Government opposed, insisting that CBF was neither eligible nor entitled to an award. The District Judge allowed that he had not decided the substantive FOIA issues that had been presented by the parties. Trial Transcript, J.A. 125, 127. Nonetheless, he granted CBF's application for fees, stating:

> [W]hat happened here is the plaintiffs by whatever means were successful. They would not have been successful if they had not brought the lawsuit. It's that

> simple.... [I]ndeed, they would not have been successful unless the Court had issued an order to show cause.... It wasn't a compromise.

*Id.* at J.A. 129. The District Court awarded attorneys' fees and costs in the amount of $44,373.07, finding CBF entitled to an award because "[t]he entire public benefits when it has information regarding the use or nonuse of potentially harmful chemicals." 785 F. Supp. at 1033. The District Court made no finding as to whether USDA's basis for withholding the data was reasonable.

## II. Discussion

The Freedom of Information Act provides for the recovery of attorneys' fees in cases brought under its provisions where the complainant has "substantially prevailed." 5 U.S.C. § 552(a)(4)(E) (1988). To determine whether to award fees, the District Court must conduct a two-part analysis. *Weisberg v. United States Dep't of Justice*, 848 F.2d 1265, 1268 (D.C. Cir. 1988). First, it must determine whether the party requesting fees is eligible for them. *Id.* "Eligibility" concerns whether a party has "substantially prevailed" as required by section 552(a)(4)(E) of FOIA. Under established case law, a party is eligible for attorneys' fees when it is shown that the lawsuit was (1) reasonably necessary and (2) that the litigation substantially caused the requested records to be released. *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976). USDA argues that CBF failed to prove that it was eligible for fees. We are unpersuaded, however. CBF not unreasonably believed that the survey data would not be unconditionally released absent a lawsuit, *see Fund for Constitutional Gov't v. National Archives & Records*, 656 F.2d 856, 872 (D.C. Cir. 1981) (reasonable necessity determined from the perspective of a reasonable person in the position of the requester), and the lawsuit did in fact cause the release of the data by deploying the power of the court to encourage reluctant agencies to waive their confidentiality interests.

Second, the court must determine whether a party is entitled to fees. Eligibility for fees does not guarantee entitlement. *See Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365 (D.C. Cir. 1977); *see also Fund for Constitutional Gov't*, 656 F.2d at 872 (the District Court must examine whether the prevailing party is entitled to fees under FOIA). There are at least four considerations to be weighed by the court in determining whether an *eligible* FOIA litigant is also *entitled* to attorneys' fees: (1) the public benefit derived from the case; (2) the commercial benefit to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the Government had a reasonable basis for withholding requested information. *Tax Analysts v. United States Dep't of Justice*, 965 F.2d 1092, 1093 (D.C. Cir. 1992) (citing *Weisberg*, 745 F.2d at 1498). In the present case, the District Court completely failed to consider the fourth factor in deciding whether CBF was entitled to attorneys' fees. It is for this reason that the judgment of the trial court cannot stand and the case must be remanded for further consideration.

Certain points need to be clarified with respect to the scope of the District Court's reconsideration on remand. For one thing, although the test of entitlement involves a balance of several factors, *see LaSalle Extension Univ. v. F.T.C.*, 627 F.2d 481, 484 (D.C. Cir. 1980); *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 714 (D.C. Cir. 1977), there can be no doubt that a party is not entitled to fees if the Government's legal basis for withholding requested records is correct. *See id.* at 712 n.34 ("Certainly where the government can show that information disclosed after initial resistance was nonetheless exempt from the FOIA a plaintiff should not be awarded attorney fees under section 552(a)(4)(E)."); *cf. Charles River Park "A", Inc. v. Department of Hous. & Urban Dev.*, 519 F.2d 935, 942 (D.C. Cir. 1975) ("[I]f the disclosure of the information involved . . . would constitute a violation of a criminal statute, it would be an abuse of discretion for an agency to ignore such a statutory mandate and release the information."). Thus, in a case such as this one, in which the Government continues to insist that it had a valid basis for withholding requested documents,

the District Court must determine whether the Government's position is legally correct in assessing any claim for fees under FOIA. In such a situation, it does not matter that information was disclosed after initial resistance, for this does not dispose of the question whether the information sought was exempt from disclosure under FOIA. *See Nationwide Bldg. Maintenance, Inc.*, 559 F.2d at 712 n.34. If the Government was right in claiming that the data were exempt from disclosure under FOIA, then no fees are recoverable.

Further, in any event, the Government need only have "a colorable basis in law" for the court to consider the "reasonable basis in law" factor in determining a FOIA plaintiff's entitlement to attorneys' fees. *Nationwide Bldg. Maintenance, Inc.*, 559 F.2d at 712 (quoting S. Rep. No. 854, 93d Cong., 2d Sess. 19 (1974)). If the Government's position is correct as a matter of law, that will be dispositive. If the Government's position is founded on a colorable basis in law, that will be weighed along with other relevant considerations in the entitlement calculus.

In the instant case, it is clear that USDA's basis for withholding the survey data was reasonable. On its face, section 2276(a) supports the Government's claim that the information could not be released without waivers, and section 2276(c) indicates that USDA officials might have been subject to criminal penalties if they had wrongfully disclosed the documents at issue. Indeed, CBF concedes that USDA's legal argument is reasonable. Brief for Appellee at 28. Thus, on remand, the issue of the *reasonableness* of the Government's position is not open to question.

Rather, because the Government did not waver in its legal position, the District Court must either disallow fees, premised on the reasonableness of the position weighed along with the other considerations relevant to the entitlement calculus; or the court must decide whether the Government's position is legally correct—for, if so, this will be dispositive of the case. If the District Court reaches the merits of the Government's position, and holds it is incorrect, then the court still must weigh the concededly reasonable legal position along

with the other factors to determine whether CBF is entitled to fees. We feel that it is appropriate for the District Court to entertain these questions in the first instance on remand.

Finally, we reject the finding of the trial judge that Government counsel and USDA officials were guilty of obdurate conduct. This finding has no support in the record, and it surely does not in any way justify an award of fees in favor of CBF. The Government's resistance to release of the disputed documents was grounded on a reasonable (and likely correct) reading of governing statutes. Even after concluding that they had no obligation to release the documents, USDA officials still offered to seek waivers from state agencies to accommodate CBF. USDA representatives were no less reasonable following CBF's initiation of this lawsuit. When the trial judge initially suggested that he might force the release of the data without a hearing on the merits (or pursuant to an ad hoc procedure that would affect state agencies that were not parties to the lawsuit), Government counsel wisely objected. But when the trial judge made it clear that he would allow a hearing on the merits if waivers could not be obtained from the state agencies, USDA representatives cooperated without further objection. And the solution implemented by the trial court—to seek waivers from the state agencies—was nothing more than what had been proposed by USDA representatives long before litigation was commenced. In light of this record, it cannot be found that Government officials were guilty of obdurate conduct.

## III. Conclusion

For the reasons stated above, the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

*So ordered.*

CHESAPEAKE BAY FOUNDATION, INC.,
Plaintiff,

v.

U.S. DEPARTMENT OF AGRICULTURE,
Defendant.

Civil Action No. 89-1943

FILED
March 11, 1992
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM OPINION AND ORDER

This case is before the Court on Plaintiff Chesapeake Bay Foundation's ("Chesapeake") Application for an Award of Attorneys' Fees. Plaintiff's underlying lawsuit was brought under the Freedom of Information Act ("FOIA"). Plaintiff now seeks recovery of its attorneys' fees and litigation costs from the Department of Agriculture ("USDA") under 5 U.S.C. § 552 (a)(4)(E), FOIA's fee and cost recovery provision. Because Plaintiff "substantially prevailed" in its FOIA action against the USDA and because it is entitled to receive attorneys' fees, this Court will grant Plaintiff's Petition.

BACKGROUND

This action was brought by Plaintiff to compel disclosure of certain USDA data concerning public agency pesticide use in and around the Chesapeake Bay watershed. The data, in part, underlie a publication entitled "Maryland Pesticides Statistics for 1985." Those statistics were issued cooperatively by the USDA and the Maryland Department of Agriculture.

Prior to the institution of the lawsuit, the parties pursued efforts to resolve the case without litigation. Plaintiff made a FOIA request in a letter dated July 26, 1988, and on August 8, 1988 the Defendant denied Chesapeake's request. Plaintiff appealed and on October 31, 1988 the USDA affirmed the denial, asserting that the information was exempt from disclosure under 7 U.S.C. § 2276. The parties also entered into negotiations concerning a possible effort to obtain consent from the state agencies to disclose that information. Those negotiations were unsuccessful and the USDA continued to maintain its confidentiality agreement with the state agencies. Defendant did not proceed on its own accord to obtain any waiver of that agreement from the state and thereby avoid litigation. Plaintiff brought this FOIA suit compelling disclosure.

The Plaintiff and the Defendant appeared before this Court on March 13, 1990 for a status call. At that time both parties had adopted adversarial postures and wished to proceed towards summary judgment on the merits under FOIA. At issue was what was the import on normal FOIA disclosure requirements when the information sought was collected by a state from its own agencies and then voluntarily given to a federal agency under a good faith confidentiality agreement. Indeed much of the transcript from the hearing reflects the arguments of the parties concerning the merits of their positions on this complex legal issue. Transcript of Status Call, March 13, 1990 at 2-23 ("Tr.").

At the status call, however, the Court attempted to resolve the case without deciding the legal issue. The Court issued an order directing that unless the state filed an objection within 60 days the material requested would be turned over to the Plaintiff. A hearing on the legal issue would only be held if the state did lodge objections and attempted to enforce the terms of its confidentiality agreement with the USDA. The Court order was aimed at resolving the case by first ascertaining whether the state was truly concerned with maintaining confidentiality. If there was

no objection by the state, the Court would presume that the state did not wish to enforce its confidentiality agreement, and the material would be turned over pursuant to the Court's order.

The USDA argued against the Court issuing such an order. The government attorney indicated that she would have to "go back and discuss with the agency" but that the USDA "might seek an appeal" from the Court's order. Tr. at 28. The USDA also repeatedly asserted that, notwithstanding its earlier negotiations regarding a state waiver, the USDA had an "independent interest and [it] would want an opportunity to present that to the Court." Tr. at 30, 31. It was clear to the Court that, whatever position the USDA had taken before the lawsuit, at the status call it was in a 'litigation mode' and was opposed to any disposition which would result in Plaintiff receiving the requested information. Tr. at 34. Despite the government's position, the Court issued the Order for the State of Maryland to Show Cause why the information should not be given to Plaintiff. No objections were filed by the state, and the Plaintiff received substantially all the material it requested from the USDA. Plaintiff then filed this Petition for Attorneys' Fees and Litigation Costs.

## DISCUSSION

Under FOIA, a Court may "assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed." 5 U.S.C. § 552 (a)(4)(E). Because the Plaintiff is both eligible for and entitled to attorneys' fees and because the USDA concedes that the amount requested is reasonable, the petition for $44,373.07 will be granted.

Whether a party has "substantially prevailed" under FOIA and is eligible for attorneys' fees and costs is a question of fact, and "it is well established in this circuit that

this inquiry is largely a question of causation." Weisberg v. U.S. Dept. Of Justice, 745 F.2d 1476, 1496 (D.C. Cir. 1984). Thus, the Court must determine whether the legal action could "reasonably be regarded as necessary" to obtain the information and whether a "causal nexus exists between that action and the agency's surrender of that information." Id. Because Plaintiff's action before this Court was necessary and resulted in it obtaining substantially all the information it requested, Plaintiff is eligible to recover its attorneys' fees and litigation costs.

It is undisputed that Plaintiff received substantially all of the material it requested. Defendant, however, claims that the suit was not the cause of Plaintiff gaining that information. The Defendant asserts that because this Court did not decide the legal issues in the case and because a waiver idea had been discussed by the parties prior to litigation, the suit was not necessary. Those arguments are without merit. The Defendant cannot seriously contend that FOIA does not permit an award of attorneys' fees and costs unless the Court resolves the legal issues in the case. Such a rule would place a premium on possibly needless litigation while penalizing deserving litigants by denying them their attorneys' fees should they accept a settlement providing them with substantially all the relief they sought. The proper inquiry, then, is not what legal issues the Court decides, but whether Plaintiff was successful and whether that success was a direct result of the lawsuit.

Defendant also cannot claim that its prelitigation settlement negotiations in this case rendered the litigation any less necessary to the receipt of the information. Although the government is to be commended for attempting to settle the case before a suit is filed, the government's obligation to reasonably avoid protracted litigation over possibly moot issues does not end when the complaint is filed. Plaintiff commenced this action only after its FOIA request was denied. The government responded to Plaintiff's action by filing its motion for summary judgment. In that motion and

throughout the litigation the government sought to deny Plaintiff access to the information it sought. It contended that its grant of confidentiality to the state precluded disclosure of the information sought by Plaintiff.

The USDA did not need Plaintiff's permission to seek a waiver of confidentiality from the state. The waiver was only obtained after this Court requested that the state agencies show cause why the documents should not be turned over to the Plaintiff. When the Court indicated it would issue such an order the USDA was not receptive to this idea. The USDA reserved its right to appeal the order. It is clear to this Court that the USDA wished to litigate the legal issues at that time. The USDA repeatedly asserted that even if such waivers from the state agencies were procured, it would seek to vindicate its independent interest in not turning over the information. It later chose not to do so.

The Plaintiff should not be denied its attorneys' fees and costs because this Court exercised restraint in resolving the case without reaching novel and complex legal issues which the government pressed it to decide. Since Plaintiff's suit was necessary and was responsible for its obtaining the information requested, it is eligible for reasonable attorneys' fees and costs.

An eligible Plaintiff is "entitled" to attorneys' fees and litigation costs based upon the Court's balancing of the following four factors: (1) the benefit of the release to the public; (2) the commercial benefit of the release to the plaintiff; (3) the nature of the plaintiff's interest; and (4) the reasonableness of the agency's withholding. See Weisberg, 745 F.2d at 1498.

The Plaintiff in this case is clearly entitled to fees and costs under these factors. Chesapeake was acting as a public watchdog in obtaining this information. The entire public benefits when it has information regarding the use or nonuse of potentially harmful chemicals. In addition, the Plaintiff had no commercial interest in obtaining the information. Rather, it was only attempting to ascertain whether or not the

information collected by the USDA indicated that the public as a whole was being subjected to unsafe or unhealthy chemical use. That interest is entirely appropriate for an award of attorneys' fees and costs. The fact is that Plaintiff would not have obtained the important information it requested "but for" its bringing this lawsuit.

Plaintiff is therefore entitled to an award of reasonable attorneys' fees and litigation costs. Since the Defendant does not contest the amount of the fee petition and the charges appear reasonable to the Court, Plaintiff's Fee Petition is granted in the amount of $ 44,373.07.

A separate order accompanies this opinion.

DATE: 3/10/92

/s/ Stanley Sporkin
Stanley Sporkin
United States District Judge

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 92-5174** **September Term, 1993**

USDC CV 89-01943

Chesapeake Bay Foundation, Inc.

v.

Department of Agriculture,

Appellant

FILED
March 11, 1994

RON GARVIN
CLERK

BEFORE: Wald, Edwards and Sentelle, Circuit Judges

**ORDER**

Upon consideration of appellee's petition for rehearing, filed February 10, 1994, it is

**ORDERED** by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:
/s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

Supreme Court, U.S.
FILED
SEP 19 1994

No. 94-64

# In the Supreme Court of the United States

OCTOBER TERM, 1994

CHESAPEAKE BAY FOUNDATION, INC., PETITIONER

*v.*

UNITED STATES DEPARTMENT OF AGRICULTURE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals erred in requiring the district court to consider whether the government's objection to the disclosure of materials requested under the Freedom of Information Act, 5 U.S.C. 552(a)(4)(E), was legally correct before awarding attorney's fees under that Act.

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

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No. 94-64

CHESAPEAKE BAY FOUNDATION, INC., PETITIONER

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UNITED STATES DEPARTMENT OF AGRICULTURE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 11 F.3d 211. The opinion of the district court (Pet. App. 12a-17a) is reported at 785 F. Supp. 1030.

### JURISDICTION

The judgment of the court of appeals was entered on December 28, 1993. A petition for rehearing was denied on March 11, 1994. Pet. App. 18a. On May 26, 1994, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 9, 1994. The petition was filed on July 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

In May 1988, petitioner wrote to the Department of Agriculture (USDA) requesting unpublished data that had been provided to USDA in connection with a 1985 survey of Maryland pesticide use. Noting that the data had been collected from public agencies pursuant to pledges of confidentiality, USDA declined to provide the information, except in summarized form, without waivers by those agencies of any objections to release. C.A. App. 8. However, USDA offered to seek such waivers from the providing agencies and to absorb the administrative costs of doing so, if petitioner would pay the postage.

Petitioner instead filed a formal request for the data under the Freedom of Information Act (FOIA), 5 U.S.C. 552(a)(4)(E). USDA denied this request, relying on FOIA exemption 3 (5 U.S.C. 552(b)(3)), which exempts from FOIA's disclosure requirements information the release of which is prohibited by another statute.[1] Here, USDA explained, disclosure was prohibited by the confidentiality guarantees contained in 7 U.S.C. 2276, which bars the disclosure to the public of information furnished pursuant to the Department of Agriculture's authority to procure information concerning agricultural statistics, except in a form that "does not allow the identification of the person who supplied particular infor-

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[1] 5 U.S.C. 552(b)(3) provides in relevant part that FOIA is inapplicable to matters that are

> specifically exempted from disclosure by statute * * * provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

mation." Violation of those confidentiality guarantees renders the discloser liable to criminal penalties.[2] USDA renewed its offer to request waivers from the agencies that had supplied the information and to pay the administrative costs related to contacting the agencies, except for the postal costs.

Petitioner did not respond to either of USDA's offers to seek waivers, and instead administratively appealed the denial of the FOIA request, arguing that public agencies are not covered by the confidentiality guarantees of 7 U.S.C. 2276. USDA denied petitioner's administrative appeal, concluding that the records sought by petitioner are specifically exempted from disclosure by the confidentiality guarantees of 7 U.S.C. 2276. Petitioner then brought this action against USDA to compel the agency to release the pesticide data.

At a status call, Judge Sporkin urged the parties to seek waivers from the state agencies to avoid a trial on the merits. Judge Sporkin also issued an order directing the public agencies and the Attorney General of Maryland to file any objections to the release of the survey information, and to state their objections at a scheduled hearing.[3] In response to those actions, USDA wrote the interested agencies, inviting them to execute an enclosed authorization for release of the information. The agencies that had submitted the pesticide data

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[2] The statute does not expressly provide for waivers, but the confidentiality provisions appear to have been designed solely to protect the submitter of the data. Presumably, therefore, if the submitter waives that protection, the criminal penalties for disclosure do not apply.

[3] As the court of appeals noted, "the trial judge never explained the basis for his 'orders' to state agencies that were not parties to the lawsuit." Pet. App. 3a.

waived their confidentiality interests, and petitioner received the information it sought.[4]

Petitioner then applied for attorney's fees and costs under FOIA, 5 U.S.C. 552(a)(4)(E), and was awarded $44,373.07. Judge Sporkin applied the established two-part analysis for fee awards under FOIA: he first considered whether petitioner was "eligible" for an award, that is, whether the suit caused the release of the information; second, he considered whether petitioner was "entitled" to an award, that is, whether a fee award would serve the underlying purposes of FOIA. Judge Sporkin concluded that petitioner was eligible for fees because its suit "was necessary and resulted in it obtaining substantially all the information it requested." Pet. App. 15a. He then found that petitioner was entitled to an award because "[t]he entire public benefits when it has information regarding the use or nonuse of potentially harmful chemicals," and because petitioner had no commercial interest, but was merely investigating possible public exposure "to unsafe or unhealthy chemical use." *Id.* at 16a-17a. Judge Sporkin did not discuss whether USDA's basis for withholding the data was reasonable.

The court of appeals reversed and remanded. Pet. App. 1a-11a. Although the court of appeals acknowledged that the "solution implemented by the trial court * * * was nothing more than what had been proposed by USDA

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[4] Although two agencies did not waive their confidentiality rights, petitioner nonetheless received information from them. The Wicomico County Department of Parks and Recreation released the survey data directly to petitioner's counsel. Information collected from the Maryland Department of Education was released to petitioner despite the agency's lack of consent because it contained only aggregate data that would not disclose the identities of the submitters.

representatives long before litigation was commenced," the court of appeals nonetheless agreed with the district court that the "lawsuit did in fact cause the release of the data." *Id.* at 8a, 11a. However, the court of appeals concluded that the district court's award of fees "cannot stand" because the district court had "completely failed to consider" whether the government's basis for withholding the information was reasonable. *Id.* at 9a. It therefore directed the district court, on remand, to apply the four-factor test (under the "entitlement" prong of the two-part analysis) followed by the court of appeals for determining whether attorney's fees should be awarded under FOIA,[5] and to weigh the reasonableness of the government's position "along with other considerations in the entitlement calculus." *Id.* at 10a. If the district court determined that the balance of factors weighed in favor of an award of fees, the court of appeals instructed the district court to consider the merits of the government's legal basis for withholding the requested documents. If they were in fact exempt from disclosure under FOIA, the court of appeals concluded that "no fees are recoverable." *Ibid.*[6]

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[5] That test requires consideration of (1) the benefit of the release to the public; (2) the commercial benefit of the release to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the government's withholding had a reasonable basis in law. Pet. App. 9a.

[6] The court of appeals noted that "it is clear that USDA's basis for withholding the survey data was reasonable," and that the government's reading of the governing statutes to bar the release of information in the absence of waivers was "likely correct." Pet. App. 10a, 11a.

## ARGUMENT

The Freedom of Information Act allows recovery of attorney's fees when the requester has "substantially prevailed." 5 U.S.C. 552(a)(4)(E). To determine whether to award fees in a particular case, courts typically conduct a two-part analysis. First, the court determines whether the party seeking fees is "eligible" for them, that is, whether the litigation was necessary and was a substantial cause of the release of the documents. The second part of the analysis—and the one at issue in this case—is a FOIA litigant's "entitlement" to attorney's fees. In determining entitlement, courts ordinarily consider at least four factors: (1) the benefit of the release to the public; (2) the commercial benefit of the release to the plaintiff; (3) the nature of the plaintiff's interest; and (4) whether the government's withholding had a reasonable basis in law. See, *e.g.*, *Tax Analysts* v. *Department of Justice*, 965 F.2d 1092, 1093 (D.C. Cir. 1992); see also S. Rep. No. 854, 93d Cong., 2d Sess. 19 (1974).

1. Petitioner contends that the decision below "has created an irreconcilable conflict in the circuits [because] * * * the other circuits require that, at a minimum, all four factors * * * be considered in assessing a FOIA fee application." Pet. 6. In fact, no such conflict exists, and the court of appeals' explanation of how the district court should approach the entitlement issue on remand is unexceptionable. Contrary to petitioner's contention (Pet. 9), the court of appeals' decision is not "at odds" with the decisions requiring that all four factors be considered. In fact, the court of appeals concluded that the district court's fee award "cannot stand" precisely because of the district court's failure to consider one of the factors—the reason-

ableness of the government's position. Pet. App. 9a. The court of appeals expressly directed the district court to consider all four factors, weighing "the reasonableness of the [government's] position * * * along with other considerations in the entitlement calculus." *Id.* at 10a.

However, it is clear that those four factors are not the exclusive determinants of whether FOIA fees should be awarded; additional factors may be considered. See S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 10 (1974) (explaining the omission of the four factors from the legislation on the ground that "a statement of the criteria may be too delimiting and is unnecessary"). The court of appeals determined that, in this case, if the four-factor test weighed in favor of the award of fees, an additional factor should be considered—whether the information released was subject to FOIA's disclosure provisions. This application of the principles of FOIA and its attorney's fee provision serves the statute's underlying aims in this case; it is in no way contrary to the decision of any other court.

In the typical FOIA fee litigation, FOIA fees are sought only after the government has lost a suit on the merits challenging its withholding of the requested information. The usual issue in fee litigation is thus whether the government's position, although incorrect, was reasonable. Here, the requested information was voluntarily released after the state agencies had waived their confidentiality guarantees, and the question whether the information would have been available under FOIA without such waivers was never litigated. As the court of appeals observed, the government's basis for withholding the requested data, in light of the statutory prohibition on its release, was "concededly reasonable" and was "likely correct." Pet. App. 10a, 11a. Under these circumstances, the court of appeals appropriately

directed the district court to consider an additional factor in the entitlement calculus—whether the government's position was legally correct because, absent waivers, the disclosure of the information was statutorily barred.

No court, to our knowledge, and certainly no decision cited by petitioner, awards fees under FOIA for obtaining documents excluded from FOIA's provisions. It would not further any conceivable purpose of FOIA to award attorney's fees for obtaining documents the disclosure of which was not authorized by FOIA. Indeed, such an award would undercut FOIA's aims. FOIA, while reflecting a general policy of agency disclosure, specifically exempts nine enumerated categories of documents from the disclosure requirements. Congress created those exemptions because it "realized that legitimate governmental and private interests could be harmed by the release of certain types of information." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982).[7] Awarding fees in cases like the instant one would penalize the government for developing creative solutions, as it did here, that both protect the statutory guarantees of confidentiality and allow voluntary disclosures of information.

2. Petitioner relies on the criteria for fee awards under a variety of other statutes. All are irrelevant. The civil rights fee statutes, such as 42 U.S.C. 1988 (Supp. IV 1992), establish a lower threshold for awarding attorney's fees. As the legislative history of FOIA's fee provision shows, the rule of a presumptive award of attorney's fees was not adopted for FOIA cases. See Pet.

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[7] Indeed, in this case, USDA withheld the documents because their release was affirmatively prohibited by another statute, 7 U.S.C. 2276.

7-8 (discussing legislative history). Instead, Congress expected the courts to apply criteria like those cited above to determine the circumstances in which a fee award should be made. The legislative history makes clear that those criteria were not expressly enumerated in FOIA itself because Congress believed that "the existing body of law on the award of [FOIA] attorney fees recognizes such factors," and "a statement of the criteria may be too delimiting and is unnecessary." S. Conf. Rep. No. 1200, *supra*, at 10. Moreover, as the Conference Report explained, "[b]y eliminating these criteria, the conferees did not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria." *Ibid.*

Similarly, the Equal Access to Justice Act, 28 U.S.C. 2412(d) (EAJA), also cited by petitioner, has no bearing on this case. As petitioner observes (Pet. 16-17), the determination of whether the government's position was substantially justified so as to preclude an award of EAJA fees does not generally involve a definitive determination of the merits of the case. But nothing in the language or legislative history of FOIA's fee provision precludes a court, when ruling on a fee application, from considering whether the information released was covered by FOIA, as the court of appeals required the district court to do here.

3. Finally, petitioner claims that the court of appeals' decision is contrary to considerations of judicial economy and would discourage settlement. Pet. 14. In fact, it is petitioner's own position, if adopted, that would greatly deter settlements and thus tend to promote needless litigation. If FOIA fee awards were routinely available once information is released, even if that information is not subject to FOIA, the government

would have a strong incentive not to turn over information voluntarily, since by doing so it would render itself liable to fee awards.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1994

(3)

Supreme Court, U.S.
FILED
SEP 23 1994
OFFICE OF THE CLERK

No. 94-64

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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CHESAPEAKE BAY FOUNDATION, INC.,
*Petitioner,*

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
*Respondent.*

---

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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## REPLY IN SUPPORT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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No. 94-64

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CHESAPEAKE BAY FOUNDATION, INC.,
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*Respondent.*

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## REPLY IN SUPPORT OF CERTIORARI

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The question in this case is whether, in a Freedom of Information Act case that is resolved prior to a ruling on the merits, a district court must, at the attorney's fees stage, determine whether the government would have won the case on the merits, and deny fees if it answers that question affirmatively. As demonstrated in the Petition, this holding is at odds with decisions of other courts of appeals, cannot be squared with decisions of this Court interpreting similar fee-shifting statutes, and would seriously impede the settlement of FOIA cases.

The government responds to the Petition as if this were a routine case, in which the court of appeals simply told the district court to consider, but not treat as dispositive, the merits of the underlying action. But that is not what happened here. Rather, the decision of the court of appeals mandates that all FOIA litigation resolved short of a decision on the merits must still be decided on the merits and all fees denied if the court determines that plaintiff would not have prevailed had the case been litigated to judgment.

1. As we noted in the Petition (at 4), if the court of appeals had simply ruled that this case should be remanded to consider whether respondent's withholding had a reasonable basis, we would not have sought review in this Court. Under the prevailing case law, the district court must consider the reasonable basis factor along with, at a minimum, the other three factors discussed in FOIA's legislative history. But that is not what the court of appeals held; rather, on three separate occasions, the court stated, in no uncertain terms, that if "the Government's position is legally correct ... this will be dispositive of the" fee application (10a).[1]

At the end of its Statement of the Case, respondent acknowledges, ever so subtly, that the court of appeals' ruling requires that fees be denied if, after settling the merits, the government can show that it would have prevailed on the merits. Opp. 5 ("If [the documents] were in fact exempt from disclosure under FOIA, the court of appeals concluded that 'no fees are recoverable'"). Thereafter, however, respondent does not confront the actual holding below and repeatedly asserts, without citation, that the court of appeals remanded the case simply "to consider" another factor not addressed by the district court. Opp. 5. *See also id.* at 7 ("The court of appeals determined that ... an additional factor should be *considered*"); 7-8 ("the court of appeals appropriately directed the district court *to consider* an additional factor ..."); 9 ("nothing in the language or legislative history of FOIA's fee provision precludes a court ... *from considering* whether the information released was covered by FOIA ...")(emphasis added).

Only by ignoring the clear language of the ruling below, and claiming that the court of appeals merely added another nondispositive factor to the exercise of the district court's discretion, can respondent argue that the court of appeals' approach is "unexceptionable" and not in conflict with other courts of appeals. Opp. 6. But as explained in the Petition, the ruling of

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[1] *See also* 9a ("[T]here can be no doubt that a party is not entitled to fees if the Government's basis for withholding requested records is correct"); 10a ("If the Government was right in claiming that the data were exempt from disclosure under FOIA, then no fees are recoverable").

the court of appeals is plainly inconsistent with cases such as *Crooker v. United States Parole Comm'n*, 776 F.2d 366, 369 (1st Cir. 1985), which held that "[o]ne factor alone is not dispositive," even where the government's withholding of the documents concededly was not unreasonable, and *Local 598 v. Dep't of the Army Corps of Engineers*, 841 F.2d 1459, 1462-64 (9th Cir. 1988), and *Blue v. Bureau of Prisons*, 570 F.2d 529, 533-34 (5th Cir. 1978), which held that it is an abuse of discretion if the district court fails to consider all four factors cited in FOIA's legislative history. *See also* Pet. 10 n.5 (citing cases from other circuits to the same effect). Thus, by requiring the district court to decide the merits of settled FOIA cases, and to deny fees if the court finds that the documents were properly withheld, the court of appeals has plainly parted company with its sister circuits.[2]

**2.** Without citation (Opp. 7), respondent attempts to undercut the broad impact of the decision below by claiming that "[i]n the typical FOIA fee litigation, FOIA fees are sought only after the government has lost a suit on the merits ... ." In the experience of undersigned counsel, whose office has litigated over 200 FOIA suits, there is simply no basis for this statement. As in other litigation, many FOIA cases settle, and thereafter the parties turn to the issue of fees. Thus, in many FOIA cases, the court of appeals' ruling will greatly complicate resolution of the fee dispute in a way that Congress never intended, by reintroducing the merits in otherwise resolved cases.

In this regard, the government makes only a half-hearted attempt to counter the argument that the D.C. Circuit's approach is at odds with national policies favoring settlement. The

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[2] Respondent claims that its position is somehow strengthened because "no decision ... awards fees under FOIA for obtaining documents excluded from FOIA's provisions." Opp. 8. This proves far too much, and thus nothing at all. Naturally, when a plaintiff loses on the merits, he or she has not "substantially prevailed" under 5 U.S.C. § 552(a)(4)(E), and therefore is not eligible for a fee. On the other hand, whenever documents are disclosed through settlement, the merits will, by definition, not be resolved. Thus, the question whether fees can be awarded to someone who was not legally entitled to the documents has never been decided, prior to the unprecedented ruling of the court of appeals here.

government does not dispute that early settlements of the merits may be greatly reduced because such settlements would make it difficult, if not impossible, for the plaintiff to gain adequate information to prove his or her case at the fee stage. Pet. 14-15. Nor does respondent contest that the court of appeals' ruling will make FOIA fee disputes much more time-consuming and complex for the parties and the judiciary alike. Pet. 15.

The government's only response on the question of settlement is limited to one point that falters because of its erroneous factual premise. Respondent maintains that settlements will actually be encouraged by the decision below because otherwise "FOIA fee awards [would be] *routinely available* once information is released, even if that information is not subject to FOIA ... ." Opp. 9 (emphasis added). But existing law does not make FOIA fees "routinely available" in settled cases. Rather, in order to be entitled to fees in such cases, the district court must assess all relevant factors, including the reasonableness of the government's position, without assigning any one factor dispositive weight. *See, e.g., Crooker, supra.* Because the court of appeals has added a new factor, which, if decided in the government's favor, *is* dispositive, it is the impact of the decision below, and not the existing scheme embraced by the other courts of appeals, that will make settlement more difficult.

**3.** Finally, respondent has mischaracterized petitioner's citation to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). EAJA requires the courts to consider whether the government's position was "substantially justified," *id.* § 2412(d)(1)(A), *i.e.*, reasonable, *see Pierce v. Underwood*, 487 U.S. 552, 560-61 (1988), but a ruling under EAJA, as respondent notes, "does not generally involve a definitive determination of the merits of the case." Opp. 9. That is the point. Under EAJA, a statute in which Congress has expressly required some analysis of the merits, the court need not issue a conclusive ruling on the merits of settled cases. *A fortiori,* Congress did not want the courts to make such rulings in settled cases under FOIA, where the fee provision does not even mention the reasonableness of the government's position on the merits, and the legislative history does not permit any one factor to be dispositive.

## CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 23, 1994